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Mark Alan Bodron

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NOTES

In Re J.M.P.:¹ The Louisiana Supreme Court Speaks in the Area of Private Adoption

[T]he earliest and most hallowed of the ties that bind humanity, in all countries considered sacred, is the relationship of parent and child.²

I. INTRODUCTION

An unmarried, eighteen year old mother who had surrendered her child for a private adoption³ later challenged that adoption on several grounds. First, she claimed that the act of surrender was invalid for two reasons. Her parents, she complained, refused to allow her to return to their home with the child and declined to contribute to its support. She contended that these threats amounted to duress. Further, she complained that the attorney who represented her was a partner of the attorney for the adopting parents and, for that reason, acted under a conflict of interest. Second, and in the alternative, she argued that the

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1. *In re J.M.P.*, 528 So. 2d 1002 (La. 1988).

2. *In re Voss*, 550 P.2d 481, 485 (Wyo. 1976) (Justice Raper of the Wyoming Supreme Court paraphrasing a statement made in *Bryant v. Kurtz*, 134 Ind. App. 480, 189 N.E.2d 593 (1963)).

3. "The practice of adoption is traceable back to antiquity: it was recognized in the Babylonian codes of Hammurabi." Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 Fam. L.Q. 173, 173 (1983). The practice was brought to Rome from Greece. J. Declareuil, *Rome the Law-Giver* 119 (1970). The origin of modern civil law adoption in Louisiana is found in the law of Justinian, Book I, Title VII. *The Digest of Justinian*, Vol. I (C. Monro trans. 1904). By Justinian's time, adoption had developed into a highly regulated process with rather sophisticated laws. See also W. Buckland, *A Textbook of Roman Law From Augustus to Justinian* 122-28 (2d ed. 1950); Huard, *The Law of Adoption: Ancient and Modern*, 9 Vand. L. Rev. 743 (1956). For a historical perspective on adoption in the United States, see Presser, *The Historical Background of the American Law of Adoption*, 11 J. Fam. L. 443 (1971); McCauliff, *The First English Adoption Law and Its American Precursors*, 16 Seton Hall L. Rev. 656 (1986). In Louisiana, adoption was introduced under Spanish rule; however, it was abolished under the Civil Code of 1808. It was reinstated by the legislature by 1865 La. Acts No. 48. Prior to this act, an adoption could only be granted by authorization from the legislature. *Roy v. Speer*, 249 La. 1034, 1038, 192 So. 2d 554, 556 (1966). The current adoption statutes are progressions of the law since 1865. See generally Wadlington, *Adoption of Persons Under Seventeen in Louisiana*, 36 Tul. L. Rev. 201, 202-05 (1962).

adoption was not in the best interest of the child. The supreme court held that the threats of the mother's parents did not constitute duress and, further, that the attorney's alleged conflict of interest did not vitiate the mother's consent. The court did, however, find merit in the mother's alternative claim. According to the court, the trial court, which failed to consider the possible psychological effects of the adoption on the child and instead relied primarily on the relative financial resources of the alternative sets of parents, incorrectly determined that the adoption was in the child's best interest. Accordingly, the supreme court remanded the case to the trial court to make a new determination of the interest of the child pursuant to the guidelines set out in the opinion.⁴ *In re J.M.P.*, 528 So. 2d 1002 (La. 1988).

The supreme court's decision in this case is significant for a number of reasons. First, the case represents the first time that the Louisiana Supreme Court has defined the term "the best interest of the child" as used in the private adoption statutes. The guidelines enunciated by the court are designed to determine whether an adoption is in the child's best interest when the natural parent revokes his or her consent.⁵ Second, the court recognized what has become a serious problem with private adoptions—that disputes are not being resolved expeditiously—and took steps to alleviate the problem. The supreme court emphasized that courts must settle private adoption disputes faster to allow the natural parent a fair opportunity to have her child returned and to minimize the risk of psychological harm to the child.⁶ Accordingly, the court requested remedial legislation to provide specific time periods within which lower courts must render judgment in private adoption disputes.⁷ Recognizing that immediate legislative action might not be forthcoming, the court devised an interim solution: it set forth several new procedural rules designed to expedite private adoption litigation.⁸ Because these rules give private adoption cases priority in the scheduling of cases on the court dockets, the rules will affect not only attorneys who practice in the family law area, but also other members of the profession.

4. The appellate court in *Pontiff v. Behrens*, 518 So. 2d 23 (La. App. 1st Cir. 1987) used James Myles Pontiff, the full name of the parties in the suit; however, the Louisiana Supreme Court used only the parties initials to preserve their anonymity. As the first circuit did not follow this procedure, the supreme court may be sending a subtle message to the lower courts that anonymity is the proper procedure in cases involving private adoption disputes.

5. *JMP*, 528 So. 2d at 1015. The court makes it clear that the guidelines set forth are not to be used in other types of custody disputes. Compare this definition of "best interest" with the use of the term in Louisiana Civil Code article 146(B) (child custody).

6. 528 So. 2d at 1016-17.

7. See *infra* text accompanying note 114.

8. See *infra* text accompanying notes 113-121.

The purpose of this note is to review the most significant aspects of the *JMP* decision. In the opening section, a brief general overview of the statutes governing private adoption, including those that were implicated in *JMP*, will be presented. Next, the note will address the supreme court's handling of the natural mother's claim that "duress" and her attorney's alleged conflict of interest affected her consent to the act of surrender. The paper will then explore and critique the supreme court's new guidelines for determining the "best interest of the child." The fourth part of the note will examine the court's new procedural rules for expediting the resolution of private adoption disputes and the relationship of those rules to the private adoption statutes. Finally, the conclusion will provide a discussion of proposed solutions to several of the problems identified in the earlier sections of the comment.

II. PRIVATE ADOPTION IN LOUISIANA

In Louisiana, adoptions have been subjected to stringent regulation by the legislature. The legislature has authorized only two types of adoption—"agency" adoption and "private" adoption. The agency adoption is effected through an organization licensed by the Louisiana Department of Health and Human Resources (DHHR) or by DHHR itself.⁹ An agency adoption generally takes more time to complete, primarily because of the state's heavy involvement in the process.¹⁰ To provide would-be adoptive parents with a streamlined and flexible alternative to the agency adoption, the legislature established the "private" adoption. This alternative means of adoption, in contrast to the agency adoption, is not subject to direct state control and supervision.¹¹ Recognizing that the absence of official state involvement in the private adoption process might open the door to abuses of various kinds,¹²

9. La. R.S. 9:401 (Supp. 1988).

10. Selected Legislation of the 1979 Regular Session—A Student Commentary, 40 La. L. Rev. 437, 466-67 (1980) [hereinafter A Student Commentary].

11. See, e.g., Comment, Parental Consent: The Need For An Informed Decision In The Private Adoption Scheme, 47 La. L. Rev. 889, 890 (1987); A Student Commentary, *supra* note 10, at 469; cf. *F.D. v. Associated Catholic Charities of New Orleans, Inc.*, 480 So. 2d 380 (La. App. 4th Cir. 1985), writ denied, 481 So. 2d 1353 (1986) (acknowledging that private adoptions do not provide the same procedural safeguards as agency adoptions, resulting in a greater probability of abuse with the private adoption); see also La. R.S. 9:423-29 (Supp. 1988), which provide that once the petition for adoption is filed with the proper court, the only information supplied to the court is an investigative report of the DHHR concerning the suitability of the adopting parents and the type of living conditions they appear to provide for the child, with the focus of the report on the adopting parents. Therefore, the statutes do not allow the natural parent, or any other interested party outside of the DHHR, to submit documentation or question the viability of the adoption from the standpoint of the child's best interest.

12. *F.D. v. Associated Catholic Charities of New Orleans, Inc.*, 480 So. 2d 380, 383 (La. App. 4th Cir 1985), writ denied, 481 So. 2d 1353 (1986).

particularly the unfair treatment of the surrendering parent, the legislature imposed stringent procedural requirements upon that process, requirements that generally have no parallel in the agency adoption context, with the enactment of the Private Adoption Act.¹³

The private adoption process begins with a voluntary act of surrender executed by the natural parent. The statutes recognize two forms for the act of surrender—authentic and notarial.¹⁴ For the purposes of this note, only the authentic act of surrender need be addressed. In order to qualify as an authentic act of surrender, the act must contain the various elements required by Louisiana Revised Statutes 9:422.6.¹⁵ One

13. 1979 La. Acts No. 686, § 1.

14. La. R.S. 9:422.3 (Supp. 1988), as amended by 1987 La. Acts No. 702, §1, provides for both an authentic and a notarial act of surrender. However, the statute only acknowledges the notarial act of surrender indirectly without providing a definition or substance other than a notarial act, which does not recite every element required by Revised Statutes 9:422.6 (Supp. 1988) (authentic act of surrender). See *In re R.L.V.*, 484 So. 2d 206, 217 (La. App. 1st Cir. 1986) (The court held "that an act, authentic in form but which does not contain all enumerated elements for a 'fail-safe' act of surrender provided for by La. R.S. 9:422.3 through 422.14, can, nevertheless, suffice as a 'notarial act' for the purposes of applying La. R.S. 9:429." The court relied in part on Note, *In Re CDT: The Need For Greater Clarity in Private Adoption*, 44 La. L. Rev. 845 (1984), and its interpretation of legislative intent. Legislative intent was evidenced by the 1979 amendments retention of the notarial act language in the statutes. 1979 La. Acts No. 686, §1.; cf. 1988 La Acts No. 411, effective September 1, 1988, which amends La. R.S. 9:440.1 and validates all acts of surrender executed prior to January 1, 1988.

In *JMP* the dispute concerned an authentic act of surrender.

15. La. R.S. 9:422.6 (Supp. 1988) states:

A. The authentic act of voluntary surrender for private adoption shall contain the following:

(1) The complete name of the mother and the father if his name is stated on the child's birth certificate or an application for certificate in the event the certificate has not been issued.

(2) The parish of each indicated parent's domicile.

(3) The age of each indicated parent.

(4) The marital status of the parents.

(5) The parish in which child was born.

(6) The names of each prospective adoptive married couple or other person qualified to petition for adoption of the child, or the name and address of the attorney at law who is acting as the representative of the adoptive parent or parents.

(7) The date of birth of the child to be surrendered.

(8) The name given the child, if any, on the application for birth certificate, or on the official birth certificate.

(9) A declaration that the act is not being signed earlier than the fifth day following the birth of the child, using the method of computing as set out in the Code of Civil Procedure Art. 5059.

(10) A declaration that the parent or parents, and their legal representatives, if applicable, freely and voluntarily surrender custody of the child for the purpose of private placement and adoption and that the parent, parents, and legal

of the more important of these elements is a certification that the surrendering parent has been advised by an attorney.¹⁶ By requiring that the act of surrender include these elements, the legislature intended to ensure that a natural parent who gives up her child for adoption understands the significance and legal ramifications of her actions. That the parent have this understanding is critically important, for signing the act of surrender creates a legal presumption that the natural parent has fully and voluntarily given her consent to the act of surrender.¹⁷

In addition to the elements necessary for an authentic act of surrender, the private adoption statutes provide two other safeguards for the surrendering mother. First, the mother may not execute a valid act of surrender before the fifth day after the birth of the child.¹⁸ Second, the natural mother may revoke her consent to the act of surrender if she does so "within thirty days after executing the authentic act of surrender."¹⁹

representatives, if applicable, consent to the adoption.

(11) A declaration that the parent, parents, and legal representatives, if applicable, have been advised by an attorney other than the attorney for the prospective adoptive parent or parents that all parental rights are to be terminated upon executing the act, provided by R.S. 9:422.8, subject, however, to the right to oppose the adoption, as provided by R.S. 9:422.10 and 422.11, if exercised timely in the manner provided by R.S. 9:422.10.

(12) A declaration that notice and service of any pleading of any sort in any subsequent adoption proceeding is waived.

(13) A declaration that the natural parents, or either of them, lacks full contractual capacity, if applicable, by virtue of minority or other legal disability.

(14) A declaration that a natural parent who does not have full contractual capacity is joined in the act of surrender by that parent's tutor, guardian, curator, or other legal representative.

B. Each person whose signature is required on an act of surrender must sign the act in the presence of a notary and two witnesses. The notary shall affix his official seal to as many originals of the acts as are executed.

16. *Id.*

17. La. R.S. 9:422.3 (Supp. 1988) states in the pertinent part: "The act of surrender shall be presumptive evidence of a legal and voluntary surrender only if it contains every element required by R.S. 9:422.6, and is in all other respects executed in accordance with the provisions of this subpart."

18. La. R.S. 9:422.7 (Supp. 1988). Note that these requirements for a valid act of surrender are used in reference to an authentic act of surrender only. Due to the nebulous character of the notarial act of surrender—there are neither statutes nor case law defining a "notarial act of surrender"—it is uncertain whether any of the requirements for a valid authentic act of surrender are applicable to the notarial act, including the "five day" rule of Revised Statutes 9:422.7.

19. La. R.S. 9:422.10 (Supp. 1988). Note that Revised Statutes 9:422.6, which lists the requirements of the authentic act of surrender, states that the act constitutes "irrevocable consent" of the consenting natural parent. This language is misleading on its face because it specifically states that the consent given is "irrevocable." However, the possibility of opposition and revocation of consent are referred to only by their respective statute

Louisiana Revised Statutes 9:422.10 requires that the revocation be "a clear and written declaration of intention to oppose the adoption and [the natural mother's] desire to revoke the consent previously given in the act of surrender."²⁰ The revocation, however, is not absolute: it does not ensure the return of the child.²¹ Instead, the revocation of consent triggers a hearing by the court to determine whether permitting the adoption would be in the best interest of the child.²²

number ("except as specifically provided in R.S. 9:422.10 and 422.11"; La. R.S. 9:422.10 (Supp. 1988) provides for the opposition to the adoption by a revocation of consent and La. R.S. 9:422.11 (Supp. 1988) is the legal effect of the revocation.) The statute's emphasis is on the "irrevocability" of consent, not the equally important exception of revocation. The emphasis supports the requirement that the natural parent have independent legal counsel at the execution of the act of surrender.

20. La. R.S. 9:422.10 (Supp. 1988) states:

A. The parent or parents, and their legal representative, if applicable, or the child's tutor, who executed the authentic act of voluntary surrender, may oppose the adoption of the child only within thirty days after executing the authentic act of surrender. Such opposition or attempted revocation of consent shall be made only by a clear and written declaration of intention to oppose the adoption and their desire to revoke the consent previously given in the act of surrender.

21. La. R.S. 9:422.11 (Supp. 1988) states:

A. The written declaration by either or both of the natural parents, or his, her, or their legal representatives, if applicable, or the child's tutor, provided for in R.S. 9:422.10, who executed the authentic act of voluntary surrender shall not bar a decree of adoption if the decree is in the best interests of the child.

In the case of *In re G.O.*, 433 So. 2d 1115 (La. App. 3d Cir. 1983), the court states:

The formal act of surrender thus has the threefold effect of (1) transferring the custody of the child to the person or persons named in the act; (2) granting the consent of the surrendering parent or parents to the adoption, subject to the rights of the parent or parents to withdraw consent within thirty days; and (3) termination of all parental rights. This right to revoke consent has the limited effect of giving the surrendering parent or parents standing to oppose the adoption. It has no effect on the transfer of custody effected by the formal act of surrender or the termination of parental rights.

433 So. 2d at 1117.

22. Revised Statutes 9:422.11 provides that the revocation of consent "shall not bar a decree of adoption if the decree is in the best interest of the child." The court in *JMP* states that the revocation of consent creates the necessity for a hearing by the trial court to make the best interest determination. *JMP*, 528 So. 2d 1002, 1012 (La. 1988). It is noteworthy that section 422.11 provides that after the thirty day period for revocation has expired and an interlocutory decree has been granted by the court without opposition, the adoption can only be prevented if the Louisiana Department of Health and Human Resources (DHHR) issues a report that the adopting parents are unfit and the court agrees with the report after conducting a best interest hearing. Section 422.11 was amended by 1987 La. Acts No. 702, §1 (effective July 9, 1987), to change the requirement from "or" to "and," giving the court discretion to permit the adoption even when the DHHR finds the adopting parents unfit. Section 427 sets out the elements required to be reviewed and reported within the DHHR's confidential report. Note that in *Hargrave v. Gaspard*, 419 So. 2d 918 (La. 1982), the court held that the adopting parents have no right of access to the confidential report. See also La. R.S. 9:429, 432 (Supp. 1988).

III. VITIATION OF CONSENT

A. *Duress*

One week after the birth of her child, Dawn B., the natural mother, executed an authentic act of surrender at the home of Mr. and Mrs. B., her mother and step-father, where she resided. According to her testimony at the hearing, Dawn wanted to keep her child; however, she began to consider other options after her mother and step-father informed her that they were not willing to assist in the child's rearing and support. Initially Dawn considered an abortion but she abandoned the idea after she learned that she was too far into her pregnancy. Subsequently, she contacted an attorney who arranged for a private adoption of the child by his clients, Mr. and Mrs. J.M.P. Believing that she had no alternative but to sign the act of surrender, Dawn went through with the adoption. Dawn never informed her attorney of her desire to keep the child. Later, Dawn sought to undo the adoption on the ground that the actions of her parents constituted duress sufficient to vitiate her consent. Both the trial court and the intermediate appellate court found that the evidence failed to support this claim.

Reviewing the determination on appeal, the supreme court began by setting forth the applicable law. The court acknowledged that the private adoption statutes do not provide any method for the annulment of an act of surrender when consent has been vitiated.²³ The court noted, however, that it had already filled this gap in the law by holding, in several prior cases, that one may annul an act of surrender if its execution was induced by error, fraud, or duress.²⁴ The definition of duress, provided in Louisiana Civil Code article 1959, the court observed, contains both an objective and a subjective element.²⁵ Thus, to evaluate a

23. *JMP*, 528 So. 2d at 1007-08; see also La. Civ. Code arts. 2029-35 (nullity of contracts).

24. *Wuertz v. Craig*, 458 So. 2d 1311 (La. 1984). See also La. Civ. Code art. 1948; *JMP*, 528 So. 2d at 1008 n. 3; (citing cases in other jurisdictions consistent with this view); *In re Shavor*, 428 So. 2d 952 (La. App. 1st Cir.), writ denied, 433 So. 2d 155 (1983); *Ball v. Campbell*, 219 La. 1076, 55 So. 2d 250 (1951).

25. La. Civ. Code art. 1959 states:

Consent is vitiated when it has been obtained by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property, or reputation.

Age, health, disposition, and other personal circumstances of a party must be taken into account in determining reasonableness of the fear.

Further, comment (b) of this statute addresses duress in relation to contracts and consent. Relying on the Restatement (Second) of Contracts, the comment states that there is duress when "a person makes an improper threat that induces a party who has no reasonable alternative to manifest his assent. The result of this type of duress is that the contract that is created is voidable by the victim."

claim of duress, one must determine whether a reasonable person with the same individual characteristics as the complaining party would have felt compelled to consent to the contract under the same type of threat.²⁶ However, if the "threat" is to exercise a legal right or to do a lawful act, duress does not occur, even if the threat does influence the complaining party's decision.²⁷ The court further noted that the party asserting duress bears the burden of proof, for a validly executed authentic act of surrender creates a presumption that the parties to it freely and voluntarily gave their consent.²⁸

Applying these principles to the facts of the case, the supreme court concluded that Dawn's consent had not been vitiated by duress. According to the court, the kind of pressure exerted by Dawn's mother did not pose a threat of considerable injury to Dawn's person, property, or reputation. Further, the court held that it was Mr. and Mrs. B.'s legal right not to allow Dawn to raise her child in their home. Therefore, the court reasoned, even if the threat was the sole reason for Dawn's consent, there still was no duress.²⁹

Although the record of the court of appeal and the supreme court are not entirely clear on this point, the natural mother in *JMP* apparently overlooked a possible argument that might have been marshalled in support of her claim of duress, an argument based upon the alimentary duties of ascendants and descendants.³⁰ Louisiana imposes a legal obligation upon a parent to maintain his child who is in need, whether that child is a minor or a major.³¹ The legal obligation extends beyond the parent-child relationship to other ascendant-descendant relationships,

26. *Benner v. Van Norden*, 27 La. Ann. 473, 477 (1875); *Lewis v. Lewis*, 387 So. 2d 1206, 1210 (La. App. 1st Cir. 1980); see also 4 Aubry and Rau, *Cours De Droit Civil Francais* #343a (6th ed. La. St. L. Inst. trans. 1965) (Contracts—Vices of Consent).

27. La. Civ. Code art. 1962 states: "A threat of doing a lawful act or a threat of exercising a right does not constitute duress.

A threat of doing an act that is lawful in appearance only may constitute duress."

See *Adams v. Adams*, 503 So. 2d 1052, 1057 (La. App. 2d Cir. 1987).

28. La. R.S. 9:422.3, 422.6 (Supp. 1988); see generally *Couder v. Oteri*, 34 La. Ann. 694 (1882) (notes executed by the plaintiff were found valid because plaintiff did not carry his burden of proving the alleged duress).

29. See La. Civ. Code art. 1962.

30. See La. Civ. Code art. 1959 quoted at *supra* note 25. See also La. Civ. Code art. 229, which states:

Children are bound to maintain their father and mother and other ascendants, who are in need, and the relatives in the direct ascending line are likewise bound to maintain their needy descendants, this obligation being reciprocal. This reciprocal obligation is limited to life's basic necessities of food, clothing, shelter, and health care, and arises only upon proof of inability to obtain these necessities by other means or from other sources.

31. La. Civ. Code art. 229; *Tolley v. Karcher*, 196 La. 685, 200 So. 4 (1941); *Dubroc v. Dubroc*, 284 So. 2d 869 (La. App. 4th Cir. 1973).

for example, that between grandparent and grandchild.³² The alimentary obligation, which is limited to the necessities of food, shelter, clothing, and health care, arises upon proof that the party seeking support is unable to provide these items for himself or through some other source and that the other party is able to pay the alimony.³³ Thus, if the natural mother in *JMP* had put on proof that she was unable to support herself, that she had no source of support other than her parents, and that her parents were able to pay the alimony, then she could have argued that her parents owed her, and perhaps the child as well, a duty of support.³⁴ Assuming that the parents did owe the natural mother such an alimentary obligation, then the parents' threat to cut off support to the natural mother and the child did not constitute the exercise of a valid legal right.³⁵

32. See *Tobin v. Tobin*, 323 So. 2d 896 (La. App. 2d Cir. 1975), writ refused, 325 So. 2d 613 (1976).

33. *Id.*; See also *Dubroc*, 284 So. 2d 869; *Johnson v. Johnson*, 128 So. 2d 779 (La. App. 3d Cir. 1961). See generally 1 Planiol, *Treatise on the Civil Law* No. 674 (12th ed. La. St. L. Inst. trans. 1959) Planiol stated that there were two conditions necessary to find "need": "(1) The creditor of the alimony must be in need, i.e. he must not be in a position to secure, by himself, some means of support, (2) The debtor must be able to pay the alimony."

34. La. Civ. Code art. 233 states:

If the person, whose duty it is to furnish alimony, shall prove that he is unable to pay the same, the judge may, after examining into the case, order that such person shall receive in his house, and there support and maintain the person to whom he owes alimony.

La. Civ. Code art. 234 states:

The judge shall pronounce likewise whether the father or mother who may offer to receive, support and maintain the child, to whom he or she may owe alimony, in his or her house, shall be dispensed in that case from the obligation of paying for it elsewhere.

35. See *Tobin*, 323 So. 2d 896. Expanding the theory of a reciprocal alimentary obligation, is there an inchoate obligation created between the child and the grandparents prior to birth? The Louisiana Supreme Court in *Malek v. Yekani-Fard*, 422 So. 2d 1151, 1152-53 (La. 1984), recognized an unborn child's right in property as an addition to those rights of the unborn child already recognized in the Civil Code in the areas of inheritance, donations, contracts, and torts. It could be argued that the alimony is a property right created by the legislature with Civil Code articles 229, 233, and 234.

In *Malek*, the natural mother was recognized as the tutrix of the unborn child. The theoretical argument would be that the natural mother's consent to the adoption may be on behalf of her unborn child, in her capacity as tutrix, as well as herself. Extending this concept, the duress could apply to either the natural mother or the unborn child, through the tutrix. The unborn child would probably qualify as "in need," thereby imposing alimentary duties on the grandparents. By refusing to assist in the support and rearing of their grandchild, when Dawn could not provide the support alone, the grandparents have violated their legal obligation. Because the grandparents no longer have a legal right to refuse the unborn child their home, the threat to Dawn is duress against the child through the tutrix. The duress vitiates the consent of the child; therefore, the act of surrender is null and void. See La. Civ. Code art. 1948 and 1959; *Ball v. Campbell*, 219 La. 1076, 55 So. 2d 250 (1951).

In resolving the duress issue in *JMP*, the supreme court certainly broke no new ground. On the contrary, the court's decision was well within the mainstream of prior Louisiana decisions on this subject. In a case similar to *JMP*, *In re Giambrone*,³⁶ a twenty year old, unmarried mother claimed that her consent to the adoption had been vitiated by her mother's refusal to allow her to bring the baby home. The fourth circuit reached the same conclusion as did the court in *JMP*: there was no duress. In making its determination, the court considered the age of the natural mother and the fact that she did not seek any other means of support for the child.³⁷ Also, the court took into account the maturity, education, and background of the natural mother as factors negating duress.³⁸ In *Giambrone* the court upheld the concept that the urging of the natural mother by her own mother, physician, and priest to surrender the child was mere counseling, not duress or undue influence.³⁹

Louisiana courts have consistently held that the fact that the natural mother was emotionally upset and crying at the time of signing the act of surrender does not sustain a finding of duress.⁴⁰ Nor is there duress if the natural mother merely vacillated in her decision to consent to the adoption.⁴¹ In such situations, the courts have found, the mother's exercise of volition is free and untainted by any vice of consent.

In only one case, *Wuertz v. Craig*,⁴² has the Louisiana Supreme Court found that duress vitiated the consent of the natural mother. The natural mother consented to the adoption after her grandmother threatened to bring criminal charges against her if she did not sign the act of surrender. However, there was no legal basis for the criminal charges. Although the grandmother made the threat in the presence of her attorney and the attorney knew that the charges were groundless, he remained silent. Under these circumstances, the court concluded, there was duress sufficient to vitiate consent.⁴³

36. 262 So. 2d 566 (La. App. 4th Cir. 1972).

37. *Id.* at 569. The court made note of the fact that the natural mother's action for return of the child was due solely to her subsequent marriage.

38. Cases in other jurisdictions consistent with the reasoning of the *Giambrone* case include: *Anonymous v. Anonymous*, 23 Ariz. App. 50, 530 P.2d 896 (1975); *In re Wojtkowiak*, 14 Ill. App. 2d 344, 144 N.E.2d 760 (1957); *In re Allon*, 356 Mich. 586, 97 N.W.2d 744 (1959); *Batt v. Nebraska Children's Home Soc'y*, 185 Neb. 124, 174 N.W.2d 88 (1970).

39. *Giambrone*, 262 So. 2d at 569.

40. *State ex rel M.B.*, 493 So. 2d 198 (La. App. 5th Cir. 1986); *Allen v. Volunteers of America*, 378 So. 2d 1030 (La. App. 2d Cir. 1979); *In re Giambrone*, 262 So. 2d 566 (La. App. 4th Cir. 1972).

41. *F.D. v. Associated Catholic Charities of New Orleans, Inc.* 480 So. 2d 380 (La. App. 4th Cir. 1985), writ denied, 481 So. 2d 1353 (1986); *Allen*, 378 So. 2d 1030.

42. 458 So. 2d 1311 (La. 1984).

43. *Id.* at 1313.

Two points about the *Wuertz* decision are particularly noteworthy. First, the court's decision apparently rested as much on the attorney's conflict of interest as it did on the actual duress exerted by the grandmother. The attorney claimed to represent the natural mother as well as the grandmother.⁴⁴ Second, one can infer from the *Wuertz* decision that in order for the forces brought to bear upon the natural mother to constitute duress sufficient to vitiate her consent, those forces must be extreme or unconscionable in nature.

This rather conservative approach to the definition of duress is reflected in the decisions of many other jurisdictions. In the case of *In re Susko*,⁴⁵ a Pennsylvania case, the mother of the natural mother suffered a stroke, which subsequently led to her death, upon learning that her daughter, who was just seventeen years old and unmarried, was pregnant. The natural mother consented to the adoption of her child after her seven brothers consistently blamed her for her mother's death and openly rejected her. The court found that the brothers' actions were highly abusive and reached a level sufficient to vitiate the natural mother's consent to the act of surrender. An Oklahoma court, in *In re Robin*,⁴⁶ found duress where the step-mother of the natural mother threatened to kill her if she did not sign the act of surrender. These cases, like *JMP* and its Louisiana predecessors demonstrate the high threshold that the complaining party must reach before a court will find duress.

B. *Conflict of Interest*

Dawn's second contention was that her consent to the surrender was invalid because the attorney who counseled her to make that decision acted under a conflict of interest. Dawn initially consulted with an attorney named Perez, who afterward arranged to have one of his law partners represent her. Perez then sought and found a couple that was interested in adopting the child and undertook to represent them in the adoption process. According to Dawn, she did not select her attorney and had never met him prior to the morning she signed the act of surrender. Under these circumstances, Dawn argued, her attorney's independence, and so also the quality of his representation, was open to serious question.

The first circuit dismissed the allegation, finding that no attorney-client relationship existed between Perez and Dawn.⁴⁷ The appellate court

44. *Id.* at 1314. The court stated "we find the act of surrender was not executed 'freely and voluntarily,' and that Ms. Wuertz lacked effective representation by an attorney at the execution of the act of surrender."

45. 363 Pa. 78, 69 A.2d 132 (1949).

46. 571 P.2d 850 (Okla. 1977).

47. *Pontiff v. Behrens*, 518 So. 2d 23, 26 (La. App. 1st Cir. 1987).

stated that the attorney-client relationship is contractual in nature and results from a clear and express agreement between the parties.⁴⁸ Because there had been no such agreement between Dawn and Perez, the court concluded, "no conflict of interest was created by Mr. Perez's law partner acting as [Dawn's] attorney."⁴⁹

The supreme court likewise concluded that Dawn's consent had not been vitiated by any unethical conduct on the part of her attorney, but for different reasons. The court disagreed with the appellate court ruling that without an employment contract between Dawn and Perez there could have been no conflict of interest.⁵⁰ The court, however, found it unnecessary to determine whether there had in fact been such a conflict. Relying on *Wuertz*, the court held that there must be a causal relationship between any conflict of interest and the consent of the mother in order for the conflict to vitiate the consent.⁵¹ In other words, the natural mother must prove that the conflict of interest induced an error that substantially influenced her consent to the act of surrender. Without proof of this causal relationship, any conflict of interest is irrelevant.⁵² Therefore, the mere fact that the attorney who counseled the mother acted under a conflict of interest will not, standing alone, warrant annulling the act.

Applying these principles to the facts of the case, the supreme court determined that Dawn had failed to prove the necessary causal relationship. Finding that the "cause" for her signing the act was Mr. and

48. See also *Grand Isle Campsites, Inc. v. Cheek*, 262 La. 5, 29, 262 So. 2d 350, 359 (1972) ("The attorney-client relationship is contractual in nature and is based upon the express agreement of the parties as to the nature of work to be undertaken by the attorney."); *Massey v. Cunningham*, 420 So. 2d 1036 (La. App. 5th Cir. 1982); *Delta Equip. and Constr. Co. v. Royal Indem. Co.*, 186 So. 2d 454 (La. App. 1st Cir. 1966). But cf., *L.S.B.A. v. Bosworth*, 481 So. 2d 567, 571 (La. 1986), in which the court states that "[t]he existence of an attorney-client relationship turns largely on the client's subjective belief that it exists." This seems to be in conflict with the underlying theory that there must be a "meeting of the minds" (mutual consent to be bound) before a contract between the parties comes into existence; see La. Civ. Code arts. 1906 and 1927.

49. *Pontiff*, 518 So. at 26.

50. *JMP*, 528 So. 2d at 1011.

51. See *Wuertz v. Craig*, 458 So. 2d 1311, 1314 (La. 1984).

52. See La. Civ. Code art. 1949, which states:

Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party.

La. Civ. Code art. 1955 expands the causal relationship notion as follows:

Error induced by fraud need not concern the cause of the obligation to vitiate consent, but it must concern a circumstance that has substantially influenced that consent.

The conflict of interest claim rests upon "error" rather than fraud or duress, thus requiring the claimant to establish the causal relationship first before proceeding further with the allegation.

Mrs. B.'s refusal to allow her to raise the child in their home, the court concluded that the conflict of interest, if it existed, had had no bearing on her decision to execute the act of surrender. Further, the majority found no evidence to indicate that Dawn's attorney had not provided her with sufficient information regarding the act of surrender and the conditional aspect of the revocation of consent.

As was noted above, in reaching this result, the court was careful to point out that it was not determining whether there had been a conflict of interest. Nevertheless, the court did devote a considerable portion of the opinion to a discussion of attorney conflicts of interest. In particular, the court reviewed the "general rule of imputed disqualification," which prohibits lawyers associated in the same firm from representing "a client when any one of them practicing alone would be prohibited from doing so."⁵³ Without reading too much into the court's discussion, one could safely assume that had the court been pressed for a ruling, it might well have found that the attorney violated the Rules of Professional Conduct. Clearly Perez, as the representative of the adopting parents, could not have represented Dawn. If so, then his law partner should have been similarly disqualified.

One interesting point about the court's decision is that it suggests a distinction between a merely "technical" conflict-of-interest violation and one that is sufficient to vitiate consent. The court determined that the attorney's representation, even if there had been a conflict of interest, had not prevented the natural mother from understanding the act of surrender. On the contrary, the court found, the natural mother had made a "knowing and voluntary surrender"⁵⁴ of the child. It seems, then, that to vitiate the act, the attorney's representation must not only be marred by a conflict of interest, but must also be so ineffective that it somehow misleads the natural mother. "Technical" breaches of the ethical rules regarding conflicts of interest are unlikely ever to have this result.

Justice Calogero dissented from the majority's resolution of the conflict of interest issue.⁵⁵ Two aspects of his opinion are particularly interesting. First, Calogero argued that the private adoption statutes, in particular, Louisiana Revised Statutes 9:422.7, implicitly require that the

53. *JMP*, 528 So. 2d at 1010-11. La. R.S. 37:211 (1988) contains the State Bar Association's Rules of Professional Conduct, found in Chapter 4—Appendix, Art. 16, effective January 1, 1987. Although the supreme court avoided addressing the conflict of interest issue, it did pose the following hypothetical: "For example, if Perez had been prohibited from representing Dawn because his representation may have been materially limited by his own interest . . . without Dawn's consent after consultation, any member of the firm would have been prohibited from representing her also." 528 So. 2d at 1012.

54. *JMP*, 528 So. 2d at 1012.

55. *Id.* at 1017 (Calogero, J., dissenting).

surrendering mother be represented by an *independent* attorney. According to Calogero, there is a difference between the attorney's simply reading the act of surrender to his client and his advising, or counseling, the client of its legal ramifications. The requirement that the natural mother be represented by an attorney is, in this view, more than just a formality. The attorney must provide full representation, including loyalty and counseling.⁵⁶ Calogero buttressed his interpretation of the statutes by citing their primary objective, namely, that the natural mother fully understand that her revocation of consent is not absolute.⁵⁷ The legislature, he argued, recognized that the natural mother cannot freely, voluntarily and knowingly consent to the act without effective representation.⁵⁸ To provide further support for his position, Calogero cited *Wuertz*,⁵⁹ specifically, the statement in the opinion that the representation provided to the surrendering parent must be more than just for appearances, and should, at the very least, be free of conflict.⁶⁰ In *Wuertz*, however, the issue of duress was intertwined with the conflict-of-interest issue.⁶¹ In reaching its decision, the *Wuertz* court seemingly placed more weight on the fact that the attorney was a party to the duress by the natural mother's grandmother, than that he acted under a conflict of interest. Thus, the *Wuertz* court apparently assumed that the conflict of interest, without duress, would not have vitiated the natural mother's consent.

The second interesting aspect of the dissenting opinion is that it expressly drew a distinction between a mere technical conflict-of-interest violation and one that is sufficient to vitiate consent. According to Calogero, a "technical conflict of interest" or a "minor deficiency" in the lawyer's representation would not warrant vitiating an otherwise valid act of surrender. In his opinion, however, the circumstances sur-

56. *Id.* at 1019.

57. *Id.* at 1018. Justice Calogero added:

Private adoptions entail a more informal procedure [than agency adoptions]. Some of the safeguards traditionally associated with agency adoptions are conspicuously absent. A well-meaning relative or friend, who may act as an intermediary, seldom has the training or experience demanded by the complexity of the situation. Even if the intermediary is a more knowledgeable professional, such as an attorney or medical doctor, he may neglect to convey much needed information to the mother. A major deficiency in private adoptions, then, is the natural mother's usual lack of access to information essential for her to make an informed decision.

Id. (quoting Comment, *supra* note 11, at 889).

58. *Id.*

59. 458 So. 2d 1311 (La. 1984).

60. *Id.* at 1314.

61. *Id.* The court stated that "the act of surrender was not executed 'freely and voluntarily,' and . . . Ms. Wuertz lacked effective representation by an attorney at the execution of the act of surrender"

rounding the conflict of interest in *JMP* provided sufficient cause for nullifying the act.⁶² Calogero pointed to certain passages of the natural mother's testimony which, in his view, evidenced that she did not fully understand the legal ramifications of the act.⁶³ Her lack of understanding, he suggested, was attributable to the attorney's inadequate legal representation, which in turn sprang from his conflict of interest. Thus, the conflict-of-interest violation here was more than merely technical.

During the time *JMP* was being litigated, the legislature amended Louisiana Revised Statutes 9:422.7 to specifically require that each party to the act of surrender have separate representation.⁶⁴ In a footnote to the opinion, the court acknowledged this change in the law, but held that the prior version of the statute was controlling.⁶⁵ Although the court did not address the ramifications of the amendment for situations similar to that present in *JMP*, one can argue with some confidence that the amendment should have no significant impact. The requirement that each party to the adoption have separate representation does not necessarily undermine the rule established in *Wuertz* and *JMP* that a conflict of interest is insufficient, standing alone, to vitiate the natural mother's consent to the act of surrender. As long as the attorney fully advises the natural mother and she then freely and voluntarily consents to the act of surrender, her consent apparently would not be vitiated by a conflict of interest that constitutes a mere technical violation of the statute. If this supposition is correct, then the natural mother's only

62. Based on Justice Calogero's opinion of the cases, "the conflict of interest coupled with the absence from the record of evidence that relator was counseled on the specific consequences of signing the act of surrender" should invalidate the act. *JMP*, 528 So. 2d at 1022. Justice Calogero contends that the majority avoids the real issue, the disposition of the child *after* living with the prospective adopting family for a substantial period of time (two and one-half years for the child in *JMP*) when the act of surrender is null and void. There are two lines of thought expressed in the case law. The first view is expressed in *Sorrentino v. Family & Children's Soc'y of Elizabeth*, 72 N.J. 127, 367 A.2d 1168 (1976), in which the court would not return the child to the natural parents unless such action was warranted after a hearing to determine what would be in the child's best interest. The second view is expressed in *In re B.G.D.*, 719 P.2d 1373 (Wyo. 1986), in which the court held that the child should automatically be returned to his or her natural parent(s), without regard of the adoptive parents. See *infra* text accompanying note 122.

63. *JMP*, 528 So. 2d at 1020.

64. La. R.S. 9:422.7(A) (Supp. 1988), as amended by 1987 La. Acts No. 702, §1, requires that the surrendering parent "shall be represented at the execution of the act [of surrender] by an attorney . . . [who] shall not be the attorney who represents the person or persons who are the prospective adoptive parents, or an attorney who is a partner or employee of the attorney or law firm representing the prospective adoptive parents." Compare with La. R.S. 9:422.7 *prior* to the 1987 amendment, which stated that "[t]he surrendering parent or parents shall be represented by an attorney at the execution of the act of surrender."

65. *JMP*, 528 So. 2d at 1007 n. 2.

remedy under such circumstances is to revoke her consent; she cannot succeed in having the act set aside on the ground that her consent was vitiated.⁶⁶

IV. GUIDELINES FOR DETERMINING THE "BEST INTEREST OF THE CHILD"

JMP represents the first decision in which the supreme court has provided a useful definition of the phrase "the best interest of the child," as that phrase is used in the private adoption statutes. Before exploring the meaning of this new definition, it will be helpful first to examine the "best interest" standard as it was understood by the courts of appeal before *JMP*. The first section of this part will be devoted to that subject. The second section will examine the court's new standard, as well as the sources from which that standard was derived. In the third and final section, several problems likely to arise in the course of implementing that standard will be discussed.

A. *The "Best Interest of the Child" Prior to JMP*

The idea that the child's best interest should be the most important consideration in determining whether to uphold an adoption, more important even than parental rights, was first advanced by Judge Cardozo back in 1925.⁶⁷ In the Private Adoption Act of 1979, the Louisiana legislature incorporated this proposal into the state's law of private adoption.⁶⁸ Under the Act, the natural mother's revocation of consent does not bar the adoption decree if the court determines that the adoption "is in the best interest of the child."⁶⁹ The legislature, however, neither

66. The difference between "revoked" and "vitiated" consent is significant. When consent is vitiated, there is no best interest hearing, in theory, because the act of surrender never existed, and the natural mother's child should be returned.

67. *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925).

68. 1979 La. Acts No. 686, §4. The term "the best interest of the child" is also used in the child custody area in Civil Code article 146. The article applies to custody disputes between the two natural parents, as in a divorce setting, and to disputes between the natural parent and a non-parent, a situation similar to a private adoption dispute. In a contest between the natural parent and a non-parent, the statute provides that the court shall not award custody to the non-parent unless "an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interest of the child." La. Civ. Code art. 146(B). Further, in *Turner v. Turner*, 455 So. 2d 1374, 1378 (La. 1984), the court held that the best interest of the child is the appropriate standard and the sole criterion to be applied in resolving the dispute. Also, in *Boyett v. Boyett*, 448 So. 2d 819, 823 (La. App. 2d Cir. 1984), a case involving a custody dispute between a natural parent and a non-parent, the court acknowledged that the natural parent has a paramount right to custody, meaning there is a natural parent bias in this, which is consistent with the adoption disputes.

69. La. R.S. 9:422.11(A) (Supp. 1988).

defined the phrase "the best interest of the child" nor provided the courts with any guidelines or procedures for making this determination. Consistently with the legislature's intention, the Louisiana Supreme Court acknowledged, in *In re Latiolais*, that "the best interest of child" is the primary criterion for determining whether a disputed adoption should proceed.⁷⁰ The supreme court, however, repeatedly neglected to define this criterion. Lacking any clear guidance from the legislature or the supreme court, the state's appellate courts were forced to define the criterion on their own.

Despite the absence of any significant direction from the supreme court, the circuit courts eventually all adopted the same basic approach to determining the child's best interest. According to these courts, this determination is to be made by considering several different factors, including the fitness of the respective parties, the physical surroundings of the adoptive parents' home as compared to those of the natural parent's home, and the respective financial positions of the competing parties. The second circuit's approach is representative. That court read the private adoption statute that requires the best interest hearing in *pari materia* with the adoption statute that governs DHHR's confidential report to the court, a statute that requires DHHR to consider several factors in deciding whether to approve the adoption.⁷¹ Those factors include the physical and mental condition of the child, the moral and financial fitness of the adopting parents, the conditions of the prospective home with respect to health, and "other advantages and disadvantages to the child."⁷² The last factor gives the court the discretion it may need to assure a proper judgment in unique or difficult factual situations. Consistent with the approach of the second circuit, the third circuit used similar factors, but, unlike that court, it focused primarily on the financial and personal aspects of the two parties.⁷³

As the decision rendered by the first circuit in *JMP* reveals, that court had adopted an approach to determining "the best interest of the

70. 384 So. 2d 377, 378 (La. 1980). This case involved the natural mother's second husband seeking to adopt a child from the wife's first marriage. The child's natural father, Mr. Latiolais, opposed the adoption. Because Latiolais had failed to pay court-ordered support, the trial court granted the adoption. Finding that the adoption was not in the best interest of the child, the court of appeal reversed, 376 So. 2d 555 (La. App. 3d Cir. 1979), and the supreme court affirmed. The factor crucial to the supreme court was that the termination of the father's relationship with his daughter would not be in the child's best interest.

71. *In re McK*, 444 So. 2d 1362 (La. App. 2d Cir. 1984). See La. R.S. 9:427(A) (Supp. 1988), which provides the required information to be included in the DHHR investigative report and supplied to the court.

72. 444 So. 2d at 1366.

73. *In re Kitler v. Kitler*, 445 So. 2d 202 (La. App. 3d Cir.), writ denied, 447 So. 2d 1069 (1984).

child" that was similar to that of the second and third circuits. In *JMP* the first circuit affirmed the lower court's decision after reviewing the factors that the lower court had used to determine the child's best interest. These factors included the ages of the parties, their maturity, each party's home environment, and the respective financial positions of each of the parties.⁷⁴ Both courts appeared to place their primary emphasis upon the last of these factors.

As this review of the jurisprudence discloses, none of the circuits expressly stated, or implied, that the child's psychological state, or relationship with his or her parents, is the most important consideration in determining whether to permit a disputed adoption to proceed. Rather, most courts treated those factors as secondary to the physical, mental, or other attributes and rights of the various parties. Even the second circuit, which did recognize the child's mental and physical condition as a factor, merely placed this factor on a par with all of the others.⁷⁵

B. *The "Best Interest of the Child" After JMP*

In *JMP*, the Louisiana Supreme Court, breaking with the approach of the appellate courts, devised a new method for determining "the best interest of the child" in the context of private adoptions. Prefacing its discussion of this standard, the court remarked that "[t]he basic concept underlying [it] is nothing less than the dignity of the child as an individual human being."⁷⁶ Any "best interest" standard, the court explained, cannot be static, but rather must draw its meaning from the "evolving body of knowledge concerning child health, psychology and welfare."⁷⁷

In devising its standard, the court looked to the work of some of the major contributors to this "evolving body of knowledge." From the work of Joseph Goldstein, Anna Freud, and Albert Solnit,⁷⁸ the court derived the basic premise of its new standard, namely, that "the best interest of the child" hinges on placing the child with his or her

74. *Pontiff v. Behrens*, 518 So. 2d 23, 27 (La. App. 1st Cir. 1987).

75. *In re McK*, 444 So. 2d at 1366. Query: What did the supreme court mean in *In re Latiolais*, 384 So. 2d 377 (La. 1980), when it stated that the best interest of the child should be the primary concern of the court? Did the court view the child's best interest as a separate, superior factor in the analysis, or as a general concept comprised of all the factors reviewed by the court on an equal footing, as the circuit courts were doing?

76. *JMP*, 528 So. 2d at 1013.

77. *Id.*

78. *Id.* at 1014. See J. Goldstein, A. Freud, & A. Solnit, *Beyond the Best Interest of the Child* (1973) [hereinafter Goldstein]. This is consistent with the legislative intent of the Private Adoption Act because it has been suggested that the drafter's use of the phrase in the Private Adoption Act was also influenced by the work of Goldstein. See Comment, *supra* note 11.

“psychological parent.”⁷⁹ The court also adopted the three guidelines developed by Robert Mnookin⁸⁰ to assist courts in making this premise operative. The guidelines are as follows: (1) is each party seeking custody fit to serve as the child’s parent; (2) if so, from the child’s perspective have either of the adoptive parents become a “psychological parent;” (3) if the answer to the second inquiry is “no,” then the child should be returned to the natural mother of the child, that is, the biological parent; if the answer to the second inquiry is “yes,” then the child should remain with the adoptive parents and the adoption should proceed.⁸¹ After setting out these guidelines, the supreme court gave a brief explanation of each of them and defined the proper scope of the new standard.⁸²

Regarding the first guideline, which concerns the fitness of the parties, the court stated that custody may never be awarded to a party who may “endanger the health of the child under minimum standards for child protection.”⁸³ Thus, where one of the parties presents “an immediate and substantial threat to the child’s physical health,”⁸⁴ custody must be awarded to the other party. If a party is found “unfit” the analysis stops; since that party cannot gain custody, it serves no purpose to review the psychological factors.⁸⁵

The second guideline, which concerns the notion of a psychological parent, forms the heart of the court’s new approach. The court explained that whether there is a psychological parent must be viewed from the

79. *JMP*, 528 So. 2d at 1013.

80. *Id.* at 1013. See R. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *Law & Contemp. Probs.* 226, 282 (1975). The guidelines are based on two underlying objectives of Goldstein: first, to make the decision maker aware that *the child* is a victim, and without a quick resolution of the custody dispute there is a risk of harm to his development; second, the child’s interest should neither be balanced against, nor subordinated to, the adults’ interest. J. Goldstein, A. Freud, & A. Solnit, *supra* note 78, at 54.

81. Mnookin, *supra* note 80, at 282, 287. In *JMP*, the supreme court stated:

If the natural mother is fit, the broad social policy of basing custody and responsibility on the biological relationship outweighs whatever material advantages might be provided by the adoptive parents, if neither of the adoptive parents is the child’s psychological parent. On the the other hand, if the adoptive parents are fit, and the child has formed a psychological attachment . . . the adoptive parents should be preferred so as to avoid the grave risk of mental and emotional harm to the child which would result from the change in custody, even if the natural parent is relatively affluent.

528 So. 2d at 1015-16.

82. *JMP*, 528 So. 2d at 1013-15. The supreme court also acknowledged that Mnookin’s work was the primary source of the analysis. *Id.* at 1013 n.7. See Mnookin, *supra* note 80.

83. *JMP*, 528 So. 2d at 1013.

84. *Id.*

85. *Id.*

child's perspective. That relationship develops as a result of the interaction between the child and an adult, where the adult has made the child feel wanted and needed by providing for his or her physical and emotional demands.⁸⁶ Importantly, the court noted that an adult can be the child's psychological parent, without being the biological parent.⁸⁷ According to the court, the severance of this relationship may cause great harm to the child's mental and physical development.⁸⁸ To forestall this negative effect on the child, he or she should be placed with the psychological parent whenever possible.⁸⁹

The third guideline, the court pointed out, comes into play only when the court finds that the natural parent is fit and that neither of the adoptive parents is the child's psychological parent. Under the guidelines, a psychological parent who is not a biological parent should be awarded custody over the biological parent.⁹⁰ When there is no psychological parent, however, the need to preserve the child's "sense of lineage and access to his extended biological family" and society's high value on "family autonomy" justify placing the child with the natural parent.⁹¹ By assuring the placement of the child with the natural parent in those situations where all other things are equal, the third guideline builds into the standard a natural parent preference. This preference, however, is consistent with the social values incorporated into our law.⁹²

After explaining the general contours of the three guidelines, the court offered a few comments regarding their scope. The guidelines, the court stated, are to be used in most, but not all, private adoption disputes.⁹³ The court delineated two categories of limitations.⁹⁴ First, the guidelines are restricted to use in "private litigation." The guidelines

86. *Id.* at 1014.

87. *Id.*

88. *Id.*

89. *Id.* at 1013. The natural parent preference incorporated into the guidelines is consistent with the supreme court's underlying theory in the treatment of past adoption cases. *Wuertz v. Craig*, 458 So. 2d 1311 (La. 1984); *Roy v. Speer*, 249 S. 2d 1034, 192 So. 2d 554 (1966). Also, the natural parent bias can be seen in child custody disputes between a natural parent and a non-parent. La. Civ. Code art. 146(B); see *supra* note 68. Compare with the fact that some jurisdictions have rejected the natural parent preference as being contrary to Goldstein's theory because it prevents the true, or pure, determination of "the best interest of the child" from being the primary concern of the court. *Alaska, S.O. v. W.S.*, 643 P.2d 997, 1002 (Alaska 1982); *California, In re Barnett's Adoption*, 54 Cal. 2d 370, 354 P.2d 18, 6 Cal. Rptr. 562 (1960); *Idaho, In re Anderson*, 99 Idaho 805, 589 P.2d 957 (1979); *New Mexico, Barwin v. Reidy*, 62 N.M. 183, 307 P.2d 175 (1957).

90. See *Mnookin*, *supra* note 80, at 286.

91. *JMP*, 528 So. 2d at 1015.

92. *Id.*

93. *Id.*

94. *Id.*

therefore have no application in cases arising under the laws governing child neglect and foster care. Second, and more importantly, the court stated that the guidelines are not to be applied to other custody-type disputes. One example of such a dispute is where the suit is between two fit natural parents who are also psychological parents of the child.⁹⁵ Further, the court noted that when there are two psychological parents, current psychological theories when there are two psychological parents, current psychological theories cannot provide a means of choosing between the parents.⁹⁶

Applying the guidelines delineated above, the supreme court in *JMP* found that the trial court had failed to consider whether a psychological relationship had developed between one of the adopting parents and the child.⁹⁷ The court noted that the trial court heard no testimony from a psychologist or psychiatrist and did not weigh the biological relationship between the child and the natural mother.⁹⁸ Instead, the court based its decision primarily on the financial situations of each party.⁹⁹ In view of the defects in the best interest hearing, the supreme court vacated the judgment of the lower court and remanded the case so that the trial court could hold another best interest hearing using the guidelines.¹⁰⁰

C. *Problems In Implementing JMP*

Although the supreme court in *JMP* has provided guidelines that the trial court must use to determine what is in the child's best interest, that guidance may be of limited value. As has been noted, those guidelines require the lower court to determine whether any of the parties to the disputed adoption is the child's "psychological parent." However, as the supreme court itself acknowledged, the use of the guidelines is not appropriate in all private adoption disputes.¹⁰¹ Further, and more importantly, the criteria that the supreme court provided to assist the trial court in ascertaining who is the "psychological parent" are, at best, vague.

In the case of *In re G.E.T.*¹⁰² the first circuit became the first appellate court to struggle with the application of the new *JMP* guidelines. In that case, the adopting parents were the maternal grandparents of the child. Shortly after both parents signed the act of surrender, the

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1015-16.

99. *Id.* at 1015.

100. *Id.* at 1017.

101. *Id.* at 1015.

102. 529 So. 2d 524 (La. App. 1st Cir. 1988).

child's father revoked his consent, triggering a best interest hearing. In order to assist him in making the best interest determination, the trial judge appointed a psychologist to examine the child and the parties. At the hearing, the psychologist stated that, in his opinion, the natural parents were not capable parents, but the grandparents were. Further, he stated that the child regarded both her natural father and her grandparents as "psychological parents." Although he refused to offer an opinion regarding whether the adoption itself was in the child's best interest, he did indicate that it was in the child's best interest that she remain in the grandparents' custody.¹⁰³ The trial court, in a decision rendered prior to the supreme court's opinion in *JMP*, ruled in favor of the natural father. Although the court acknowledged that the natural parents "have their problems," it refused to find that the natural father was unfit.¹⁰⁴ Further, the trial court, noting that the natural parents were separated, concurred with the father's claim that placing the child with the maternal grandparents would have the effect of terminating his relationship with his child.¹⁰⁵ According to the court, preserving the father-daughter relationship would promote the child's best interest.¹⁰⁶

On appeal, the first circuit reviewed the trial court's decision in light of the *JMP* guidelines. Applying those guidelines, the court of appeal first found that both parties to the dispute were fit.¹⁰⁷ The court expressly disagreed with the psychologist's conclusion regarding the father's fitness, ruling that marital difficulties alone do not make one an unfit parent. Second, the court concluded that both the "psychological parent" and biological parent factors pointed in favor of placing the child with the natural father. The court evidently accepted the psychologist's conclusion that the child considered both her natural father and her maternal grandparents as "psychological parents."¹⁰⁸ For this reason, the court concluded that severing the child's relationship with her father would have a traumatic impact on the child. According to the court, "[i]n view of the fact that [the child] has a psychological relationship with her natural parents, as well as her grandparents, the existence of this relationship with her grandparents does not mitigate in favor of adoption."¹⁰⁹

The *GET* case illustrates several problems that are likely to arise as the lower courts endeavor to follow the *JMP* guidelines. First, because

103. *Id.* at 527.

104. *Id.* at 528.

105. *Id.*

106. *Id.*

107. *Id.* at 529.

108. *Id.*

109. *Id.* Query: Could the court have dismissed the private adoption issue and treated this situation as a custody dispute between a parent and a non-parent under Civil Code article 146(B)?

of the court's cursory and somewhat confusing account of the limitations upon the scope of the guidelines, the lower courts may end up applying the guidelines in situations for which they are not designed. As was noted above, the court pointed out in explaining the limitations on the applicability of the guidelines, that "existing psychological theories do not provide the basis for choosing generally between two adults where the child has some relationship and psychological attachment to each."¹¹⁰ If one examines the sources from which the court drew the guidelines, particularly the work of Professor Mnookin, then it is clear that the court, in making this statement, intended to preclude the application of the guidelines to any situations in which the child has a psychological relationship with both parties, regardless of the nature of the dispute. The court, however, did not make this point clearly. In the course of the court's discussion, the statement regarding multiple-psychological parent situations follows immediately after the court's statement that the guidelines do not apply to child custody disputes. Consequently, one who is unfamiliar with the sources from which the court drew the guidelines might conclude that the court's remark about multiple-psychological parents was related only to the limitation regarding custody cases, and perhaps was intended to explain why the guidelines will not function properly in the custody context. Evidently, the *GET* court read the guidelines in this way. This reading of the statement, although understandable, was erroneous. The guidelines clearly should not have been applied in this case, given that the child had multiple "psychological parents." Application of the guidelines to such situations will inevitably result in a favorable ruling for the natural parent, even when such a result may be contrary to the child's real best interest.

The second problem evidenced in *GET* arises out of the fact that the guidelines require the trial court to rely heavily on the assessments of psychological or psychiatric experts in making the best interest determination. This problem has two aspects. First, there is the danger that the trial court will abdicate its power to the psychologist. The first circuit's decision in *GET* illustrates this danger. There the court simply adopted, without any significant analysis or critique, the expert's conclusion that the child had formed a psychological relationship with both parties. Second, if the expert cannot make or is unwilling to give an opinion regarding the fitness of the parties or the existence of a "psychological parent," then the system tends to break down and the guidelines cannot function properly. Because the *JMP* guidelines require a determination of whether any of the parties is a "psychological parent" of the child, it seems clear that trial courts must, as a matter of necessity, turn to experts in the field of psychology or psychiatry for assistance.

110. *JMP*, 528 So. 2d at 1012; Mnookin, *supra* note 80, at 287.

Like the psychologist in *GET*, however, the expert appointed by the court may be unable to give an opinion regarding the child's best interest. Further, the expert may be unable to determine whether the child has developed a special "psychological" relationship with any of the parties. In such instances, the court might conclude that the second *JMP* factor—the "psychological parent" inquiry—is utterly indeterminate and, then, by default, proceed to a consideration of the third factor—the "natural parent" inquiry. If the court does so, however, then it will be forced to rule in favor of the natural parent. One might question whether automatically placing the child with the natural parent in such circumstances would necessarily further the child's real best interest.

As the foregoing discussion demonstrates, the guidelines may lead the trial court to an incorrect assessment of the child's best interest in some situations. One possible solution to both of the problems discussed above is for the legislature to amend the private adoption statutes to provide some test or standard whereby the trial court can determine the child's best interest in situations for which the three *JMP* guidelines were not designed. For example, the legislature could provide a multi-factor test similar to that provided in Louisiana Civil Code article 146(C), which governs the resolution of child custody disputes between the two parents.¹¹¹ Among the factors listed in that article are the moral fitness of the parties, the permanence of the family unit, the child's school record, the length of time the child has lived in a stable home envi-

111. La. Civ. Code art. 146(C) provides a list of factors which the lower courts are to consider when determining the best interest of the child:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.
- (j) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.
- (k) The distance between the respective residences of the parties.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

ronment, and the ability of the parties to provide affection, guidance, and educational resources for the child. So long as the legislature restricted the use of such a test to situations for which the *JMP* guidelines are clearly ill-suited, the supreme court's desire to ground the determination of the child's best interest upon the Goldstein theory could, at least to some extent, still be respected.¹¹²

V. EXPEDITED HEARING PROCEDURES FOR PRIVATE ADOPTION DISPUTES

In *JMP* the supreme court addressed the need to expedite the proceedings in private adoption disputes, noting that what is in the child's best interest can change considerably during the actual litigation process. *JMP* itself provides a good illustration of this problem. At the time of the trial court's best interest hearing, the child was five months old, but by the time the supreme court remanded the case to the trial court with instructions to conduct a second hearing, the child was over two and one-half years old. As the court acknowledged, the child had most likely developed a psychological relationship with one or both adoptive parents by this time.¹¹³ The problem, then, is that the longer the adoptive parents can "drag out" the judicial proceeding, the more likely the court will be to find that they are the "psychological parents." Expedited procedures would not only ensure that the natural mother who has timely revoked her consent would have a true opportunity to reclaim

112. Following this same line of thought, a law review casenote concerning the Alaska Supreme Court decision in the adoption case of *S.O. v. W.S.*, 643 P.2d 997 (Alaska 1982), suggests other factors to be considered in addition to the psychological condition of the child in question. In the casenote, *Family Law: Natural Parent Preference or the Child's Best Interest: The Court's Dilemma in S.O. v. W.S.* (Alaska 1982), 12 *UCLA-Alaska L. Rev.* 141, 153 (1982-1983), the author states:

Testimony regarding considerations such as separate trauma and continuity needs in children of a particular age will be useful, as will expert testimony addressing the psychological make-up of the child in question. Other important factors which might be introduced during the hearing include (1) the quality and length of the emotional attachments; (2) the amount of time the child has lived with the prospective adoptive parents; (3) the amount of time the child lived with, and has been separated from, the natural parent; (4) evidence of the character, moral fitness, and maturity of the parents and prospective adoptive parents; (5) the commitment to the care and development of the child; (6) the home environment and family setting, and its stability; (7) the age, sex and health of the child; (8) the desirability of continuing the existing child-third party relationship. Finally, and certainly not to be overlooked if the child is of a reasonable age, the wishes of the child should be respectfully considered.

The factors suggested are similar to those provided in Louisiana Civil Code article 146(C), quoted at *supra* note 111, provided to rebut the presumption of joint custody between the two parents.

113. *JMP*, 528 So. 2d at 1016.

her child, but would also decrease the risk of psychological harm to the child.

In an effort to redress the problems associated with delays in resolving adoption disputes, the *JMP* court took two significant steps. First, it requested that the state's judicial and legislative reform bodies study these problems and propose appropriate remedial legislation.¹¹⁴ Second, the court, exercising its supervisory jurisdiction, devised several procedures for the docketing of private adoption cases that the courts must follow until remedial legislation is adopted. The time frames set up by the court are as follows: (1) within twenty days of receiving formal or informal notice of the mother's revocation of her consent to the act of surrender, the trial court must rule on the best interest issue; (2) the trial court must fix the return date of any appeal at no more than twenty days after the day that estimated costs are paid; and (3) within twenty days of the lodging of the record on appeal, the court of appeal must hear and decide the matter. Unfortunately, the implementation of the court's expedited docketing procedures is not unproblematic.

First, there are a number of difficulties with the court's suggestion that the first period is to commence upon the lower court's "receiving formal or informal" notice of revocation. One question that naturally arises is what is an informal notice and how it is received. Would a phone call to the judge or a handwritten note left on his desk constitute informal notice? Is the court in "receipt" of notice when the writing (assuming there is one) is left with the clerk of court or an employee of the judge, or only when the judge himself becomes aware of the mother's desire to revoke? A related problem is the danger that the form of notice may in some cases be too "informal" to apprise the court of the dispute. It is not difficult to imagine a case in which the natural mother submits an informal writing to the clerk of court or one of the judge's employees, and the clerk or employee, because the writing does not bear a caption or other language clearly indicative of the mother's intent to revoke her consent, fails to recognize that the writing needs to be brought to the attention of the judge immediately. In such a case, it will be difficult for the court to comply with the twenty day rule. In recognizing the possibility of informal notice, the court's ob-

114. *Id.* at 1017. The court stated "Therefore, this court recommends to each judicial and legislative reform body that this problem be addressed and that remedial legislation and court rules be proposed as soon as possible. The clerk of this court is hereby instructed to send a copy of this opinion to each law reform body." In response to the court's request, the Louisiana State Law Institute (LSLI) has undertaken the task of proposing statutory revisions to the legislature. Professor Lucy McGough of the Paul M. Hebert Law Center, Louisiana State University, is preparing preliminary drafts of these revisions in connection with the development of a Louisiana children's code.

jective was most likely to protect the surrendering parent from losing her ability to revoke her consent because of noncompliance with procedural technicalities. Consequently, in future cases the supreme court will probably define "informal notice" liberally.

The notion of "formal" notice of revocation is likewise plagued by difficulties. The term "formal notice" presumably refers to the formal act of revocation that is contemplated by the private adoption statutes governing revocation of consent. Louisiana Revised Statutes 9:422.10 specifies that this act is to be sent to the adoptive parents "or the attorney at law who represented them in the act of surrender."¹¹⁵ The statute, however, does not state how the court is to receive notice of the act. This omission is especially troublesome when one considers that the statutes do not require that the act of revocation be filed with the court, much less provide a time within which the court must receive the act.

Second, the supreme court did not address how the docketing rules should be applied in a case, such as *JMP*, where the natural mother alleges that her consent to the act of surrender has been vitiated by duress or fraud. The first of the court's new procedural rules dictates that the best interest issue be resolved within twenty days of the trial court's receipt of notice that the natural parent has revoked her consent. Must the duress issue be resolved within the twenty day period also? In such a situation, the natural mother and the court would probably want to dispose of the consent issue first. If the court were to determine that the natural mother's consent had been vitiated, then there would simply be no need to hold a best interest hearing; if the natural mother did not truly consent to the surrender, the child presumably would have to be returned to her immediately.¹¹⁶ The difficulty, however, is that it may not be possible for the parties to prepare their cases and for the court to hear and resolve the consent issue within the twenty day period allotted by the expedited hearing rules.

The third problem with the expedited hearing procedures is closely related to the second. Within the first twenty day period, the lower court, in order to comply with the *JMP* guidelines, must determine (1)

115. La. R.S. 9:422.10 (Supp. 1988).

116. In his dissent, Justice Calogero states that the court failed to address the real issue—which is after an act of surrender—found to be invalid due to vitiated consent, should the child be returned to the natural mother or should there still be a best interest hearing to determine if the adoption should proceed? *JMP*, 528 So.2d at 1022. Justice Calogero relies on *Sorentino v. Family & Children's Soc'y of Elizabeth*, 72 N.J. 124, 367 A.2d 1168 (1976), which views consent as an issue separate from whether the child should be returned to the natural parent. The answer to this issue depends upon whether the court and/or the legislature decide to eliminate any preferences for the rights of the parents and look solely to the child's best interest. See *JMP*, 528 So. 2d at 1022-23.

whether both parties are fit and (2) if so, whether the child developed a psychological relationship with one or both of the adoptive parents. To answer these questions, the trial court must take several preliminary steps. First, DHHR must prepare fitness reports on both parties to be submitted to the court at the best interest hearing.¹¹⁷ Second, according to the *JMP* opinion the court must, or at least should, appoint a psychologist or psychiatrist to examine the child and his environment so that he may render an opinion regarding whether a "psychological parent" exists. Even if one ignores the time that will be consumed with the appointment procedures and the qualification of the psychologist or psychiatrist, and the additional cost that must be borne by the parties in order to engage the psychologist,¹¹⁸ it is doubtful whether the psychologist will be able to conduct the examination, compile the necessary information, and determine if a psychological parent exists within the limited time allotted for the best interest hearing.¹¹⁹

Yet another problem associated with the court's expedited hearing procedures is that they afford a tremendous, presumably unintended advantage to the natural parent. As has been noted, the *JMP* "best interest" guidelines require that the child be placed with the natural parent unless one of the adoptive parents has become the child's "psychological parent."¹²⁰ The psychological parent-child relationship, however, takes time to develop. Because the best interest hearing must be conducted within twenty days of the notice of revocation and the revocation must be made within thirty days of the execution of the act of surrender, the natural parents will usually have no more than fifty days within which to develop this relationship with the child. This brief period may simply not be long enough, especially if the child is a newborn. Even if a newborn child could in theory develop a psychological parent-child relationship with one of the adoptive parents during its brief period with them, the examining psychologist probably would not be able to

117. La. R.S. 9:427 (Supp. 1988).

118. Query: Should the court appoint the psychologist or psychiatrist, or will each party be able to bring in their own expert witness? It would appear that the objective of the psychologist's determination should be neutral to fulfill the underlying theory of Goldstein. See La. Civ. Code art. 146(H), which provides that in custody proceedings the court has the option of selecting the "mental health professional" or one agreed upon by the parties. Also, concerning who would qualify as a "psychologist," the court may look to La. Civ. Code art. 146(H), which defines a "mental health professional" for the purposes of Article 146 as "a psychiatrist or a person who possesses a Master's degree in counseling, social work, psychology, or marriage and family counseling."

119. The psychologist will not even have twenty days to complete his research and compile the results into an opinion concerning whether a "psychological parent" exists unless the appointment is made on the date of the filing of the revocation with the court.

120. *JMP*, 528 So. 2d at 1015.

detect the existence of the relationship.¹²¹ Therefore, the twenty day rule, combined with the thirty day revocation period and the *JMP* guidelines, creates a "bias" in favor of the natural mother; once that natural mother is found to be fit, she will almost automatically win the dispute.

The following scenario illustrates this problem. The parties arrange the private adoption prior to the birth of the child and the natural mother executes an authentic act of surrender on the fifth day after the birth, in compliance with the statute. The natural mother formally revokes her consent to the act of surrender on the thirtieth day after the date of execution and gives the trial court notice of the revocation. The trial court must now decide the best interest issue within twenty days from the receipt of this formal revocation. The court appoints a psychologist, who then begins gathering information necessary for him to form an opinion regarding whether the child has a psychological parent. The psychologist will have a maximum of twenty days to conduct his investigation. The psychologist, because the infant is still too young to be tested or evaluated successfully, is unable to render an opinion regarding whether a psychological relationship has developed within the fifty day period during which the child has been with the adoptive parents. The trial court, finding that each party is a fit parent and that the child has no psychological parent, rules in favor of the natural parent. As this scenario demonstrates, the natural parent preference that

121. See *In re G.E.T.*, 529 So. 2d 524 (La. App. 1st Cir. 1988) (the court appointed psychologist could not make a definitive judgment as to the existence of one parent being the psychological parent of the two natural parents.); Mnookin, *supra* note 80, at 287. At what age the child's "psychological parent" can be determined was addressed by the New Jersey Supreme Court in distinguishing the result of two cases with similar facts, *Sees v. Baber*, 74 N.J. 201, 337 A.2d 628 (1977), and *Sorentino v. Family & Children's Soc'y of Elizabeth*, 72 N.J. 127, 367 A.2d 1168 (1976). Both cases involved a private adoption dispute and the court's use of the Goldstein theory, with the consent of the natural mother being vitiated by duress in *Sorentino* and consent being effectively revoked in *Sees*. In *Sorentino*, the child was returned to the natural mother, but in *Sees* the child was not returned. The difference in the results of the two cases is based on the age of the children involved, 31 months in *Sorentino* and less than one year old in *Sees*. In *Sees*, the court, considering the age of the child, found "no firm basis to conclude that an inquiry focusing upon the existence of 'psychological parenthood,' . . . with an infant just one year old, would be at all helpful or productive in deciding whether that child could be raised adequately and decently by his own mother without ruinous psychological trauma." *Sees*, 74 N.J. at 222, 377 A.2d at 640. In the case of a three year old, the court felt the potential risk of harm was too great to allow the child to return to the natural mother, even though her consent had been vitiated. Therefore, the court in *Sees* determined that a child of one year of age or less would not have developed a psychological parent as opposed to the situation of a 31 month old child who would probably have developed such a relationship, thus the child must have obtained a sufficient age, somewhere between those in the two cases, before the "psychological parent" can exist.

is built into the *JMP* guidelines is amplified when the time for resolving the adoption dispute is shortened.

VI. CONCLUSION

The most reasonable place to begin in resolving many of the problems discussed in this article is at their source—the provisions of the private adoption statutes that concern the act of surrender and the revocation of consent. As *JMP* illustrates, those provisions are ambiguous and confusing in many respects and contain a number of pitfalls for the unwary. Although the *JMP* court did resolve some of the problems associated with the private adoption process, it left many of those problems unredressed and, as was argued above, seems to have generated still more difficulties. If the private adoption is to remain a viable alternative to the agency adoption, the legislature must act quickly to correct these problems. The recent amendment to Louisiana Revised Statutes 9:422.7 explicitly requiring each party to retain independent counsel is a positive step in the right direction. Some additional steps that the legislature should consider making are suggested below.

First, it is suggested that the legislature amend the private adoption statutes to establish a single form for giving notice to the trial court that the natural parent wishes to revoke her consent. The amendment should require that the form contain all information necessary to enable the court to begin acting on the dispute immediately, including the identities of the parties, their attorneys, and the child. Requiring a single form of this type would avoid the difficulties associated with the “informal notice” recognized by *JMP*. Such a requirement could be incorporated into Louisiana Revised Statutes 9:422.10, the statute governing the notice of revocation.

Second, the legislature should adopt procedures for the filing of the notice of revocation, including a provision that designates who must file that notice with the court. Since the burden of filing arguably should be placed on the party seeking to stop the adoption, the natural parent, or her attorney, should be required to file the notice form. Because the supreme court's expedited docketing procedures apply only after the court receives notice of the revocation, this amendment would eliminate any time delays in actually starting the litigation process. Further, the amendment would aid in reducing the confusion presently surrounding who is responsible for filing the declaration of revocation. By getting the dispute to the attention of the trial court more quickly, the parties would be one step closer to resolving the dispute in a timely fashion.

Third, the *JMP* guidelines, it is submitted, should be supplemented to allow trial judges greater discretion to deal with the infinite factual variations presented by private adoptions cases. As was demonstrated above, the *JMP* guidelines do not provide an appropriate means for

determining the best interest of the child in some private adoption situations. Thus, the legislature should develop a test for determining the best interest of the child based upon the factors listed in Louisiana Civil Code article 146(C), the child custody statute. The amendment should provide that this list of factors is to be used only in cases for which the three *JMP* guidelines are not suited, such as cases like *GET* and those in which the trial court cannot determine whether there is a "psychological parent." By restricting the scope of the test's application in this way, full effect can still be given to the supreme court's *JMP* guidelines, which correctly make the relationship between the child and its "psychological parent" the most important factor in the determining the child's best interest.

These proposals for reform, if adopted, would go a long way toward remedying many of the deficiencies in the state's private adoption scheme that surfaced in *JMP* and would render that scheme more compatible with the best interest guidelines and the expedited hearing procedures established by the supreme court in that case. Perhaps more importantly, the proposals would further the supreme court's commendable efforts in *JMP* to make the private adoption scheme more sensitive to the "best interest of the child."¹²²

Mark Alan Bodron

122. Two final comments:

First, It should be noted that even if these revisions of the statutes are made by the legislature, any potential effect will be moot so long as the statutes continue to recognize the notarial act alternative. The statutes give no indication regarding the content or proper form of the notarial act or how it can be revoked. In effect, it reflects an adoptive parent bias. As the law currently stands, any current or future protections afforded to the natural parent can be circumvented by use of the notarial act alternative.

Second, a post script to *JMP* should be mentioned. In its decree, the supreme court stated that "the case is remanded to the trial court for a new best interests hearing, during which this court shall retain jurisdiction so that any dissatisfied party may apply directly here for relief." *JMP*, 528 So. 2d at 1017. The trial court did conduct a new best interest hearing and ruled in favor of the adoption by Mr. and Mrs. J.M.P., granting them an interlocutory decree of adoption, with the right to petition for a final decree of adoption at the appropriate time. Pursuant to the supreme court's decree in *JMP*, after the trial court's ruling, Dawn applied directly to the supreme court to review the lower court's decision. After a review of the record, the supreme court stated that "we conclude that the trial court's decision was not based on any manifest error of fact or error of law. Accordingly, [Dawn's] application for relief is denied." In re *JMP*, No. 88-C-008. 1989 LEXIS 46, 1989 WL 887 (La. Jan. 6, 1989).

